

2002 was \$1.1 billion, which exceeded revenue for the same period in 2001 by 28%.<sup>21</sup> Revenues are expected to increase by 20% - 25% in 2002 as compared to 2001.<sup>22</sup> With respect to EBIDTA, EchoStar reported \$178 million during the First Quarter 2002. It anticipates that EBIDTA will increase approximately 80% - 100% in 2002 as compared to 2001.<sup>23</sup> Moreover, as of March 31, 2002, its cash, cash equivalents and marketable investment securities totaled \$4.5 billion.<sup>24</sup> From this, EchoStar says that it could not extract enough money to make good on its commitments to the Commission to build, launch and operate a single Ka-band satellite on schedule.

19. EchoStar's claims regarding a drought of internal funds also ring hollow when contrasted to EchoStar's investments in *other* Ka-band projects. For example, EchoStar has spent \$75.4 million on its Ka-band authorization at the 121° W.L. orbital slot.<sup>25</sup> This substantial investment in time and money was made despite the fact that the milestone for that orbital slot is three years away.<sup>26</sup> In addition, EchoStar has invested \$50 million in WildBlue, another Ka-band licensee with a June 2005 launch milestone.<sup>27</sup> But how much has EchoStar invested in VisionStar? Only \$4.6 million as of December 2001,<sup>28</sup> and now it claims that it cannot proceed further because the financial market has dried-up.

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<sup>20</sup> *Extension Request*, p. 7.

<sup>21</sup> SEC Form 10-Q, filed by EchoStar Communications, Inc., p. 2, May 6, 2002 (*EchoStar 10-Q*); See also SEC Form 425, filed by EchoStar Communications, Inc., p. 10, May 6, 2002 (*EchoStar 425*).

<sup>22</sup> *EchoStar 10-Q*, p. 17.

<sup>23</sup> *EchoStar 10-Q*, p. 22. Previous earnings reports from EchoStar are equally impressive. For example, in its final earnings report for 2001, EchoStar reported a 47% increase in revenues over the previous year, and projected revenues for 2002 to be 20 to 25% higher. SEC Form 425, filed by EchoStar Communications, Inc., March 4, 2002 (*EchoStar Investment Call*). At the same time, they reported a 47% increase in revenues over the previous year. *Id.*

<sup>24</sup> *EchoStar 10-Q*, p. 23.

<sup>25</sup> *Extension Request*, n. 7.

<sup>26</sup> Order and Authorization, *EchoStar Satellite Corporation*, 16 FCC Rcd. 2453, ¶21 (released January 31, 2001) (*EchoStar Authorization*).

<sup>27</sup> *Extension Request*, n. 7.

<sup>28</sup> *EchoStar 10K*, p. 10.

20. A drought of funds indeed. EchoStar's financial woes are an apparent result of its lack of commitment to the Ka-band and its Merger strategy, not the financial community's sour mood. A little more than a year and half ago, EchoStar told the Commission that its combination with VisionStar would "create the critical mass, scale efficiencies and realistic chances of commercial success that will help both companies to deploy Ka-band satellites as expeditiously as possible."<sup>29</sup> These representations, as with others by EchoStar, ultimately proved to be untrue.

21 EchoStar consciously determined not to fund the VisionStar satellite. It chose to cease funding the WildBlue Ka-band project. It chose to withdraw from StarBand's Ku-band project. All of these actions were taken not as a result of EchoStar's dearth of funding, but to paint the false picture that satellite broadband deployment cannot proceed unless the Commission authorizes the proposed EchoStar/Hughes Merger.

**C. EchoStar Has A Long History of Bad Faith And Disingenuous Behavior With The Commission.**

22. EchoStar's history of bad faith and disingenuous behavior are extensively detailed in the Commission's own records. A review of EchoStar's previous indiscretions reveals a disturbing pattern.

23. The Commission recently noted that "EchoStar has previously been fined by the Commission for rule violations and admonished for its 'disingenuous' behavior and lack of candor."<sup>30</sup> For example, in a June 1998 Notice of Apparent Liability (*First EchoStar Liability Order*), the Commission found it necessary to fine EchoStar the maximum forfeiture amount permitted under the Commission's rules for operating its satellite from a non-authorized

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<sup>29</sup> *EchoStar/VisionStar Application*, p. 5.

<sup>30</sup> Declaratory Ruling And Order, *In the Matter of National Association of Broadcasters and Association of Local Television Stations Request for Modification or Clarification of Broadcast Carriage Rules for Satellite Carriers*, CSR-5865-Z, n. 116 (released April 4, 2002) (*Two-Dish Order*).

location.<sup>31</sup> The FCC justified its forfeiture amount based on a laundry list of EchoStar's shortcomings: its degree of misconduct, lack of voluntary disclosure and continuing violation of the Commission's rules.<sup>32</sup>

24. In March 2000 (*Second EchoStar Liability Order*), EchoStar tried to disregard Commission requirements by placing all of its public interest programming on secondary satellites in violation of the Commission's DBS rules.<sup>33</sup> Some of the Commission's observations in this instance were especially disturbing. The Commission found that EchoStar had *willfully* violated the Communications Act and the Commission's rules.<sup>34</sup> Additionally, EchoStar was found to have been "disingenuous" in its legal interpretations.<sup>35</sup> As a result, a forfeiture was imposed by the Commission.<sup>36</sup>

25. Despite these egregious findings, EchoStar continued the same type of behavior. Although requesting confidentiality for a series of documents from the Commission, EchoStar began publicly disclosing their contents without informing the Commission. In August 2001 (*Young Broadcasting Order*), the Commission found that "EchoStar failed in its duty of candor" by withholding this information from the Commission.<sup>37</sup>

26. Even in the ongoing Merger proceeding, EchoStar has been chastised for its cavalier and disrespectful attitude towards the Commission. EchoStar was admonished by the

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<sup>31</sup> Notice of Apparent Liability, *In The Matter of EchoStar Satellite Corporation*, 13 FCC Rcd. 16510 (released June 8, 1998) (*First EchoStar Liability Order*).

<sup>32</sup> *First EchoStar Liability Order*, ¶5.

<sup>33</sup> Declaratory Ruling and Order, *American Distance Education Consortium Request For An Expedited Declaratory Ruling and Informal Complaint*, 14 FCC Rcd. 19976 (released March 22, 2000) (*Second EchoStar Liability Order*).

<sup>34</sup> *Second EchoStar Liability Order*, pp. 5558-5559; *See also Two-Dish Order*, n. 116 (discussing Commission findings related to same).

<sup>35</sup> *Second EchoStar Liability Order*, ¶4 (referencing Memorandum Opinion And Order, *Petition for Waiver of Direct Broadcast Satellite Public Interest Obligation Implementation Date*, 15 FCC Rcd. 1814, ¶7 (released December 17, 1999)).

<sup>36</sup> *Second EchoStar Liability Order*, ¶8.

Commission for its failure to comply with basic Commission rules governing the production of documents.<sup>38</sup> Exhibiting the same behavior as with its *Extension Request*, the Commission admonished EchoStar for requesting an extension "a day before the required response date."<sup>39</sup>

27. These findings by the Commission can be summed up as follows: EchoStar has *intentionally* withheld information from the Commission; EchoStar has *knowingly* disregarded Commission Rules; and EchoStar has *willfully* violated the Communications Act. Hardly an impressive description for any FCC licensee, let alone an industry leader.

28. Even more troubling is an examination of what was at stake during EchoStar's previous transgressions. In these instances, EchoStar had little or nothing -- to gain by acting as it did. In the *First EchoStar Liability Order*, EchoStar operated its satellite from an unauthorized orbital location. Even after becoming aware of the violation, EchoStar continued to operate the satellite.<sup>40</sup>

29. The *Young Broadcasting Order* involved a dispute surrounding a retransmission complaint for the carriage of local stations in Nashville, Tennessee and San Francisco, California.<sup>41</sup> Even though this dispute impacted only two stations in two markets, EchoStar still found it necessary to engage in "an abuse of the Commission's processes."<sup>42</sup>

30. Despite the minimal stakes in these cases, EchoStar still found it necessary to *willfully* violate the Communications Act, *intentionally* withhold information and *knowingly* disregard Commission Rules. What is at stake now? Far more than the location of a satellite at an

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<sup>37</sup> Memorandum Opinion and Order, *EchoStar Satellite Corporation v. Young Broadcasting, Inc.*, 16 FCC Rcd. 15070, 15075 (CSB 2001).

<sup>38</sup> Letter from W. Kenneth Ferree, Chief, Cable Services Bureau, to Pantelis Michalopoulos, Counsel for EchoStar Communications, and Gary M. Epstein, Counsel for General Motors Corporation and Hughes Electronics Corporation (March 7, 2002).

<sup>39</sup> *Id.*

<sup>40</sup> *Second EchoStar Liability Order*, ¶5.

<sup>41</sup> *Young Broadcasting Order*, ¶1.

unauthorized orbital slot or the carriage of two local stations in two markets. When examined in the context of the proposed Merger, EchoStar has everything to gain by manipulating its *Extension Request*: the creation of a DBS monopoly, its elevation to the largest Multichannel Video Programming Distributor (MVPD) in the country, and its unchallenged status as a Ka-band behemoth.

31. The motives behind EchoStar's *Extension Request* are clearly suspect. EchoStar claims that "Because of adverse financial developments, [EchoStar] was forced to delay certain payments to its satellite contractor, Lockheed Martin Corporation."<sup>43</sup> The Commission must determine exactly what EchoStar means by "forced." Who exactly forced EchoStar to do anything? Was it forced to delay payments as a result of contractual obligations? Was it forced to do so because the market dictated it? Or was EchoStar forced to do so because it made good business sense, since launching a Ka-band satellite would debunk its claim that only the Merger will enable American consumers to receive broadband service by satellite?

32. In light of EchoStar's undocumented claim that it was "forced" to delay payments to its satellite contractor, the Commission should conduct a thorough investigation into the merits and validity of EchoStar's *Extension Request*. The Commission has the authority. The Commission's rules permit it to "hold such proceedings as it may deem necessary from time to time in connection with the investigation of *any* matter which it has power to investigate under the law . . . For such purposes it may subpoena witnesses and require the production of

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<sup>42</sup> *Young Broadcasting Order*, ¶12.

<sup>43</sup> *Extension Request*, p. 3.

evidence.”<sup>44</sup> Resolution of these questions is absolutely necessary in light of the high stakes and EchoStar’s past conduct.<sup>45</sup>

33. The Commission also should broaden the scope of its February 4, 2002 Information Request to EchoStar in the Merger proceeding.<sup>46</sup> Specifically, the Commission should request a broad range of documents related to EchoStar’s Ka-band satellite program -- to include e-mail correspondence, hand-written notes, and informal memorandum -- that bear on why EchoStar was “forced” to miss payments on its satellite. The Commission should obtain the same type of information from EchoStar’s satellite contractor.<sup>47</sup>

34. EchoStar’s past actions before the Commission reveal a licensee that cares little for the Commission’s rules and regulations and even less for its authority. While the Commission strives to serve the public interest through its legal mandate, EchoStar seems to go out of its way to twist, bend and break the rules in order to gain what it wants.

**D. EchoStar Is Undermining The Ka-Band Industry To Promote Its Proposed Merger With Hughes.**

35. When looking at EchoStar’s Merger and Ka-band strategy, it becomes quite clear that EchoStar is simply engaged in a game of regulatory poker.<sup>48</sup> Take one look at EchoStar’s hand and it becomes quite clear why it is drawn to the table. First, EchoStar has a Government-issued FCC license which it acquired for a mere \$2.8 million dollars. Second, EchoStar has an unprecedented Merger on the line -- with a \$7 billion investment -- in which it has argued that

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<sup>44</sup> 47 C.F.R. § 1.1.

<sup>45</sup> The list is attached hereto as *Exhibit A*. See also *NRTC Reply*, pp. 4-10

<sup>46</sup> Letter from W. Kenneth Ferree, Chief, Cable Services Bureau, to Pantelis Michalopoulos, Counsel for EchoStar Communications, and Gary M. Epstein, Counsel for General Motors Corporation and Hughes Electronics Corporation (February 4, 2002).

<sup>47</sup> See Letter from Jack Richards, National Rural Telecommunications Cooperative, to W. Kenneth Ferree, Chief, Cable Services Bureau, p. 5 (March 13, 2002) (in its correspondence, NRTC requested a broader scope of the Commission’s Information Request, to include e-mail correspondence and informal memorandum).

only the proposed Merger will create the necessary dynamics to allow for satellite broadband deployment.<sup>49</sup>

36. If EchoStar gains approval of its *Extension Request*, it wins the hand: it keeps its Ka-band license; it will not be required to deploy its satellite until May 2005; other Ka-band licensees also will likely seek and receive extensions; and its broadband Merger 'thesis' will be advanced. If EchoStar's *Extension Request* is denied, it still wins the hand: it loses its Ka-band license (a mere \$7.6 million in poker chips); the orbital slot will need to be re-licensed; and broadband service will be delayed. Either way, the Ka-band market will be chilled and EchoStar will be able to argue that broadband deployment is doomed without the Merger. The *Extension Request* is nothing more than a juicy bet with great odds, not to mention a win-win business decision.

37. Even with these favorable odds, however, EchoStar is still trying to stack the deck. The *Extension Request* notes that EchoStar is exploring the possibility of operating its EchoStar IX satellite -- with a May 2005 milestone at the 121° W.L. orbital slot -- from the 113° W.L. slot "on a temporary basis . . . during VisionStar's extended milestone period."<sup>50</sup> In other words, EchoStar is unable to build and launch a satellite into its authorized 113° W.L. orbital slot pursuant to its FCC schedule, but it can build and launch another of its Ka-band satellites into the 121° W.L. slot *a full three years ahead of its milestone schedule*.

38. A few weeks ago, EchoStar's CEO Charlie Ergen opined that "there are many opportunities for people to get in there and compete with us as long as they are willing to do two

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<sup>48</sup> "I don't make bets that are not strongly in my favor." Charlie Ergen, Chairman and CEO, EchoStar; Andrew Ross Sorkin, *Trying To Stack The Deck So Even A Loss Is A Win*, N.Y. Times, October 30, 2001, at C-1 (*NYT Article*).

<sup>49</sup> *Application*, pp. 43-49.

<sup>50</sup> *Extension Request*, p. 4.

things: risk their capital and get off their tails.”<sup>51</sup> In this particular instance, EchoStar is willing to do neither. Far from it. Instead of risking capital, it is simply throwing it away -- writing it off as a necessary expenditure on its misguided road to Merger approval. Instead of “getting off [its] tail” to compete, EchoStar is sitting idly by while warehousing its Ka-band license.

39. EchoStar’s disingenuousness knows no bounds. For instance, NRTC has worked hard to make more capital available for the development of rural broadband services through a federal loan guarantee program.<sup>52</sup> EchoStar, on the other hand, has advised the Rural Utilities Service (RUS) that the federal loan guarantee program is not necessary to bring local television and broadband services to rural America.<sup>53</sup> At the same time EchoStar is arguing that the federal loan guarantee program is unnecessary, it is requesting that the FCC extend its Ka-band construction milestones due to the unavailability of funds for Ka-band projects as a result of an alleged downturn in the financial markets. It is time for the Commission to call EchoStar’s bluff.

**E. The Commission Should Revoke EchoStar’s License And Award It To A New Licensee Committed To Ka-band Deployment.**

40. EchoStar apparently believes that promises are made to be broken. It promised to deploy a DBS satellite to the 175° W.L. orbital slot, only to let the spectrum sit fallow for years until the Commission finally revoked its license.<sup>54</sup> It promised to provide all local stations in all local markets as a basis for its proposed Merger with Hughes.<sup>55</sup> Within days of that promise, however, it sought to overturn this requirement and deliver only those signals with “meaningful

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<sup>51</sup> Paige Albiniak, *EchoStar’s Chances, Slimmer*, *Broadcasting & Cable*, May 6, 2002.

<sup>52</sup> See *The Launching Our Communities’ Access to Local Television Act of 2000*, Pub. L.No.106-553 (2000).

<sup>53</sup> *DBS Services Sees No Need For Guarantee*, *Satellite Business News*, June 14, 2002.

<sup>54</sup> *Memorandum Opinion and Order, EchoStar Satellite Corporation, Directsat Corporation, Direct Broadcasting Satellite Corporation*, DA 02-1164 (released May 16, 2002).

<sup>55</sup> *Opposition to Petitions to Deny and Reply Comments of General Motors Corporation and Hughes Electronics Corporation and EchoStar Communications Corporation*, CS Docket No. 01-348 (filed February 25, 2002); *See also* Testimony of Charles W. Ergen before the Senate Judiciary Committee, March 6, 2002.



content.”<sup>56</sup> It promises “national pricing” if the Merger is approved, yet it wants the “flexibility” to respond to local cable promotions.<sup>57</sup> Now EchoStar is renegeing on yet another promise to the Commission. Despite promising to launch a Ka-band satellite by May 2002, EchoStar now wants to wait until May 2005. The time has come for the Commission to stop accepting EchoStar’s empty promises.

41. Instead of allowing EchoStar to break yet another promise, the Commission should act swiftly, boldly and decisively: revoke EchoStar’s Ka-band license and reassign it to a new licensee that is truly committed to its development.<sup>58</sup> Using an expedited licensing round, the Commission could ensure that the Ka-band authorization -- with the May 2005 launch date -- is awarded to a deserving licensee.

42. The Commission certainly has the authority to revoke EchoStar’s Ka-band license, which was contingent upon the April and May 2002 milestones.<sup>59</sup> Both milestones have been missed and as the authorization stipulates, the license may be rendered void.

43. At this point, the public interest would be well served by awarding the license to a more sincere licensee. Despite EchoStar’s absurd claim that “no party has expressed an interest”<sup>60</sup> in a third round of Ka-band licensing, NRTC believes that there would be multiple qualified applications interested in “risking their capital and getting off their tails” to make Ka-band broadband and local television service a reality.

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<sup>56</sup> *SBCA, et al. v. FCC, et al.*, 275 F.3d 337 (4<sup>th</sup> Cir. 2001), Petition for A Writ of Certiorari, U.S. March 7, 2002, No. 01-\_\_\_, n. 2.

<sup>57</sup> See *NRTC Petition*, p. 37; See also *Ergen Makes His Case*, Satellite Business News, December 21, 2001, at p.1.

<sup>58</sup> 47 C.F.R. § 25.161 states that “[a] station authorization shall be automatically terminated in whole or in part without further notice to the licensee upon: (a) The expiration of the required date of completion of construction or other required action specified in the authorization, or...if a certification of completion of the required action has not been filed with the Commission unless a request for an extension of time has been filed with the Commission but has not been acted on.”

<sup>59</sup> *EchoStar/VisionStar Authorization*, ¶30.

<sup>60</sup> *Extension Request*, p. 13.

**F. If EchoStar's Extension Request Is Granted, The Commission Will Be Forced To Issue Extensions To All Ka-band Licensees.**

44. In the *Extension Request*, EchoStar describes in considerable detail the financial community's apparent reticence to invest substantial new capital in Ka-band satellite projects.<sup>61</sup> EchoStar even confesses that had it not been for VisionStar's new technical and financial strength as a subsidiary of EchoStar, VisionStar may not have survived the current financial downturn.<sup>62</sup> Despite its powerful financial backing, however, EchoStar still says it has been "forced" to delay payments to its satellite contractor.<sup>63</sup>

45. As described above, EchoStar has provided no details regarding the circumstances under which it was forced to delay payments to its satellite contractor. But one thing is certain: of the twenty-four First and Second Round Ka-band licensees, EchoStar is in the *strongest* financial position. The remaining Ka-band licensees -- operating in the same financial environment as EchoStar -- can only dream of having the financial stability and capability of EchoStar. If EchoStar's extension request is granted, the Commission will be forced to grant similar requests by other Ka-band licensees.

46. Attached as *Exhibit B* are two charts, entitled "Ka-Band Licensees With Milestones That May Be Adjusted Through Commission Action," and "Ka-Band Licensees With Milestones That May Be Adjusted Through Commission And ITU Action."<sup>64</sup> As shown on *Exhibit B*,

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<sup>61</sup> *Extension Request*, pp. 2-3, 6-8.

<sup>62</sup> *Id.*, p. 5.

<sup>63</sup> *Id.*, p. 3.

<sup>64</sup> At a minimum, the Commission appears to face extension requests from the Ka-band Licensees identified on Exhibit A. See Order And Authorization, *PanAmSat Corporation*, 16 FCC Rcd 14367, fn. 49 (released August 03, 2001); Order And Authorization, *Pacific Century Group, Inc.*, 16 FCC Rcd 14356 (released August 03, 2001); Order And Authorization, *Loral CyberStar, Inc.*, 16 FCC Rcd 14346, ¶21, fn. 48 (released August 03, 2001); Order And Authorization, *Lockheed Martin Corporation*, 16 FCC Rcd 14332, ¶31, fn. 58 (released August 03, 2001); Order And Authorization, *Pegasus Development Corporation*, 16 FCC Rcd 14378, fn. 51 (released August 03, 2001); Order And Authorization, *KaStarCom. World Satellite, LLC*, 16 FCC Rcd 14332, ¶23, fn. 48 (released August 03, 2001); Order And Authorization, *Hughes Communications, Inc.*, 16 FCC Rcd 14310, ¶22, fn. 49 (released August 03, 2001); Order And Authorization, *TRW Inc.*, 16 FCC Rcd 14407, ¶25, fn. 55 (released August

EchoStar's milestones precede those of nine other licensees by at least ten months. It is safe to assume that all of these licensees will be submitting Extension Requests to the Commission if the Commission acts favorably on EchoStar's financial hardship plea.

47. The race to the Commission by financially challenged licensees -- spurred on by the claimed financial difficulties of their market leader -- will hardly soothe the apparently jittery concerns of the financial community. If the Commission acts favorably on the market leader's *Extension Request*, it should be prepared to grant a host of similar requests by less financially secure licensees as their milestone dates approach.

48. EchoStar has placed the Commission in a difficult position. Granting EchoStar's *Extension Request* will delay service from the 113° W.L. orbital slot and require that the Commission grant a blanket waiver to other requesting Ka-band licensees, thereby delaying broadband deployment. Denying the *Extension Request* and revoking the license also will play into EchoStar's plans, by requiring that the slot be re-licensed, thereby achieving the same unfortunate end. On balance, however, it is far preferable for the Commission to assign the license to a new, committed licensee than to allow EchoStar to continue gaming the system.

### III. CONCLUSION.

EchoStar's failure to meet its Ka-band milestones is indefensible. While trying to lay the blame at the feet of the financial community, its allocation of funds was the result of its own calculated business decisions. By single-handedly undermining the Ka-band market, EchoStar is attempting to demonstrate that only the proposed Merger will allow for the deployment of broadband satellite services across the country.


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03, 2001); Order And Authorization, *Lockheed Martin Corporation*, 16 FCC Rcd 14332, ¶31, fn. 58 (released August 03, 2001).

EchoStar's *Extension Request* is nothing more than its latest gambit to further its Merger prospects. This type of disingenuous behavior has become EchoStar's trademark, and it should not be countenanced further by the Commission. The Commission should revoke EchoStar's Ka-band license and award it to a new licensee.

Steven T. Berman, Senior Vice President  
Business Affairs and General Counsel

NATIONAL RURAL TELECOMMUNICATIONS  
COOPERATIVE  
2121 Cooperative Way, Suite 500  
Herndon, VA 20171

  
Jack Richards  
Kevin G. Rupy  
Keller and Heckman LLP  
1001 G Street, NW  
Washington, D.C. 20001  
(202) 434-4210

June 17, 2002

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC**

**In The Matter Of**

**VisionStar Incorporated**

)  
) SAT-MOD-20020430-00075

**Application For Modification of  
Authority To Construct, Launch  
And Operate A Ka-band Satellite  
System In The Fixed Satellite  
Service**

)  
)  
)  
)

**To: The Commission**

**AFFIDAVIT OF STEVEN T. BERMAN**

Steven T. Berman, having first been duly sworn, does hereby attest and affirm as follows:

1. I am the Senior Vice President, Business Affairs and General Counsel for the National Rural Telecommunications Cooperative (NRTC).
2. I am familiar with the above captioned application for modification of VisionStar Incorporated (VisionStar) to extend its construction and launch and operation milestones.
3. I further declare that NRTC is a party in interest and that a grant of the application would be inconsistent with the public interest, convenience and necessity.
4. I have personal knowledge of the assertions of fact presented in the foregoing Petition to Deny of NRTC and declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief. Executed on 06/17/02.

**FURTHER AFFIANT SAYETH NOT.**



Steven T. Berman  
Senior Vice President, Business Affairs  
and General Counsel  
NATIONAL RURAL TELECOMMUNICATIONS  
COOPERATIVE  
2121 Cooperative Way, Suite 500  
Herndon, VA 20171

**ECHOSTAR/DIRECTV "FLIP-FLOP" CHART**

"We have a track record of doing exactly what we say we'll do."<sup>8</sup>

-Charlie Ergen.

<u>Issue</u>	<u>Flip</u>	<u>Flop</u>
<b>The Availability Of Cable For Rural Consumers</b>	<p>"Millions of potential DBS and/or High Power DBS customers live in areas that do not have access to cable such that, if there is no competition between DIRECTV and EchoStar, there is no competition at all."</p> <p>-<i>EchoStar Memorandum</i>, Nov. 6, 2000, p. 12.<sup>9</sup></p> <p>"71% of DIRECTV customers live in areas able to receive cable television service."</p> <p>-<i>DIRECTV 2001 Cable Comments</i>, June 25, 2001, p. 13.<sup>10</sup></p>	<p>"First, nearly every household in America with a television is passed by cable: according to the FCC, 96.6 percent of TV households are passed by cable."</p> <p>-<i>Willig Declaration</i>, Dec. 3, 2001, p. 24.<sup>11</sup></p> <p>"[P]robably almost nobody watching this tonight [via satellite] doesn't have the opportunity to subscribe to cable if they'd like to."</p> <p>-Charlie Ergen, <i>Charlie Chat</i>, Nov. 12, 2001.<sup>12</sup></p>
<b>Carriage Of All Local Stations</b>	<p>"We will comply with must-carry on a single dish and carry all stations in all markets."</p> <p>-Charlie Ergen, <i>Judiciary Testimony</i>, March 6, 2002.<sup>13</sup></p>	<p>"However, the merged entity does not intend to carry all channels in every market unless the decision below is upheld."</p> <p>-<i>SBCA Petition</i>, March 7, 2002.<sup>14</sup></p>

<sup>8</sup> *Ergen Makes His Case*, Satellite Business News, December 21, 2001, p.10.

<sup>9</sup> Memorandum of Law In Support of Request for Rule 56(f) Continuance to Respond to DIRECTV Defendants' Motion For Summary Judgment, *EchoStar Communications Corporation, et al. v. DIRECTV Enterprises, Inc., et al.*, Civ. Action No. 00-K-212, p. 12 (D.Co. filed Nov. 6, 2000) (*EchoStar Memorandum*).

<sup>10</sup> Comments of DIRECTV, submitted August 3, 2001, in response to Notice of Inquiry, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 01-129, FCC 01-191 (released June 25, 2001) (*DIRECTV 2001 Cable Comments*).

<sup>11</sup> Declaration of Dr. Robert D. Willig on Behalf of EchoStar Communications Corporation, General Motors Corporation and Hughes Electronics Corporation, p. 24 (December 3, 2001) (Attachment A to the *Application*) (*Willig Declaration*).

<sup>12</sup> SEC Form 425, filed by EchoStar Communications, Inc., *Transcript of "Charlie Chat,"* November 12, 2001, p.6 (November 16, 2001) (*Charlie Chat*).

<sup>13</sup> Testimony of Charles W. Ergen before the Senate Judiciary Committee, March 6, 2002 (*Judiciary Testimony*).

<sup>14</sup> *SBCA, et al. v. FCC, et al.*, 275 F.3d 337 (4<sup>th</sup> Cir. 2001), Petition for A Writ of Certiorari, U.S. March 7, 2002, No. 01-\_\_\_, n. 2 (*SBCA Petition*).

<u>Issue</u>	<u>Flip</u>	<u>Flop</u>
<b>The Number of DMAs That Will Be Served</b>	<p>"[With the merger] [w]e would commit to the top hundred markets."</p> <p>-<i>Ergen House Judiciary Testimony</i>, Dec. 4, 2001.<sup>15</sup></p>	<p>"And as the Applicants announce here for the first time, the merger will bring [DBS services to] <i>every one of the 210 television Designated Market Areas in the United States.</i>"</p> <p>-<i>Opposition</i>, Feb. 25, 2002, p. ii (emphasis in original).</p>
<b>Competition Between EchoStar And DIRECTV</b>	<p>"DIRECTV and EchoStar react primarily to each other when setting equipment and service prices."</p> <p>-<i>EchoStar Memorandum</i>, Nov. 6, 2000, p. 12.</p> <p>"EchoStar is DIRECTV's closest competition."</p> <p>-<i>EchoStar Memorandum</i>, Nov. 6, 2000, p. 12.</p>	<p>"Executives at EchoStar and DIRECTV indicated that they monitor the pricing of the other firm, but that such pricing plays little (if any) role in their own pricing decisions."</p> <p>-<i>Application</i>, Dec. 3, 2001, fn. 5.</p> <p>"[T]he data show that the DBS services of the Applicants do not fiercely compete against each other, and the loss of existing competition from the merger is correspondingly limited."</p> <p>-<i>Opposition</i>, Feb. 25, 2002, p. 41.</p>
<b>DBS Customer Churn</b>	<p>"Many, if not most, consumers who would switch away from EchoStar if it raised its prices relative to all other subscription programming services would turn to DIRECTV."</p> <p>-<i>EchoStar Memorandum</i>, Nov. 6, 2000, p. 12.</p>	<p>"'[T]he objective of each firm is to gain market share by luring customers away from the leading cable providers,' not the customers of the other DBS firm."</p> <p>-<i>Opposition</i>, Feb. 25, 2002, p. 43.</p>

<sup>15</sup> See *Direct Broadcast Satellite Service and Competition in the Multichannel Video Distribution Market*, Oversight Hearing Before the House Committee on the Judiciary, 107<sup>th</sup> Congress, Serial No. 50, p. 66 (December 4, 2001) (statement of Charles Ergen, President and CEO, EchoStar Communications Corporation) (*Ergen House Judiciary Testimony*).

Issue	Flip	Flop
<b>Customers Abandoning the DBS Platform</b>	<p>“Absent a merger, there is a profound risk that DBS will devolve from its current position in the MVPD market as a quality and innovations leader to a lesser alternative that will cause its customers to abandon the DBS platform.”</p> <p>-<i>Opposition</i>, Feb. 25, 2002, p. 38.</p>	<p>“DIRECTV in the U.S. expects to have a stellar year, by bringing over a million new subscribers.”</p> <p>-Jack Shaw, <i>Hughes Investment Call</i>, Jan. 17, 2002.<sup>16</sup></p> <p>“Based on the quarter-to-date performance of DIRECTV U.S., we expect to significantly exceed our guidance for net new subscriber additions in the first quarter [of 2002] . . .”</p> <p>-Jack Shaw, <i>Hughes Press Release</i>, March 21, 2002.<sup>17</sup></p> <p>“Total revenue for the quarter was 1.15 billion, an increase of 13% over last quarter, and 43% better than the same period a year ago. Revenue for the year was 4 billion, an increase of 47% over 2000. Continued subscriber growth and higher revenue per subscriber were the key drivers behind this increase. We currently expect 2002 revenue to be approximately 20 to 25% higher than 2001 revenue.”</p> <p>-Michael McDonnell, CFO, EchoStar, <i>EchoStar Investor Call</i>, March 4, 2002.</p>
<b>Competition Against Cable</b>	<p>“In the unlikely event that the merger does not receive regulatory approval, I am absolutely convinced that HUGHES will be a very strong company, with many new strategic options available to increase value.”</p> <p>-Jack Shaw, <i>Hughes Investment Call</i>, Jan. 17, 2002.</p>	<p>“[T]he two firms must merge to stay competitive with . . . cable operators.”</p> <p>-<i>Opposition</i>, Feb. 25, 2002, p. 47.</p>

<sup>16</sup> SEC Form 425, filed by Hughes Electronics Corporation, *Transcript Of The Fourth-Quarter And Year-End Earnings Call* (January 15, 2002) (*Hughes Investment Call*).

<sup>17</sup> “DIRECTV U.S. to Substantially Exceed First Quarter 2002 Expectations With Over 325,000 Net New Customers,” Press Release of Hughes Electronics Corporation, March 21, 2002 (*Hughes Press Release*).



<b>Issue</b>	<b>Flip</b>	<b>Flop</b>
<b>The Meaning of National Pricing</b>	<p>"We offer nationwide pricing today and we're willing to commit to this going forward so that rural areas will get the advantages of competitive prices occurring in urban areas."</p> <p><i>-Ergen House Judiciary Testimony, Dec. 4, 2001 p. 13.</i></p>	<p>"The ability to offer local promotions for installation and equipment will not undermine the effectiveness of national pricing as a constraint."</p> <p><i>-Opposition, Feb. 25, 2002, p. 69.</i></p>
<b>Vertical Integration</b>	<p>"Unlike most large cable operators, [EchoStar] has no ownership stake in any programming producer, and the Applicants do not intend to pursue a strategy of vertical integration with programmers post-Merger."</p> <p><i>-Application, Dec. 3, 2001, p. 6.</i></p>	<p>"The Applicants hereby advise the Commission that on December 14, 2001, [EchoStar Communications Corporation] signed definitive agreements relating to a transaction with Vivendi Universal, S.A . . . Under the Agreement, Vivendi will make a \$1.5 billion investment in [EchoStar Communications Corporation] . . . As part of the transaction [EchoStar Communications Corporation] has also agreed to carry 5 new Vivendi channels."</p> <p><i>-Vivendi Letter, Dec. 18, 2001.<sup>18</sup></i></p> <p>"We're not opposed to taking a minority interest in a content provider on certain occasions."</p> <p><i>-Charlie Ergen, EchoStar Investment Call, March 4, 2002.</i></p>
<b>Favorable Programming Deals</b>	<p>"Because of their relatively small market shares, EchoStar and DIRECTV have not enjoyed the market position necessary to obtain favorable programming deals available to cable."</p> <p><i>-Opposition, Feb. 25, 2002, p. 125.</i></p>	<p>"[W]e have I think historically always been able to reach agreement with the particular programmers to something we think is fair for our consumers, and at a price that we think is fair."</p> <p><i>-Charlie Ergen, EchoStar Investment Call, March 4, 2002.</i></p>
<b>Entry Barriers to the DBS Market</b>	<p>"There are significant entry barriers to the DBS and/or High Power DBS market."</p> <p><i>-EchoStar Memorandum, Nov. 6, 2000, p. 12.</i></p>	<p>"[O]ther [satellite] companies have ample opportunity to use satellite spectrum and orbital locations . . . to introduce additional competition in the MVPD market."</p> <p><i>-Opposition, Feb. 25, 2002, p. 49.</i></p>

<sup>18</sup> Ex Parte Notice, Submitted by Counsel for General Motors Corporation and Hughes Electronics Corporation and Counsel for EchoStar Communications Corporation, Docket No. 01-348, p. 2 (December 18, 2001) (*Vivendi Letter*).

<u>Issue</u>	<u>Flip</u>	<u>Flop</u>
<b>Analog Cable Versus DBS</b>	<p>"Old, analog, rotting miles of cable . . . Once you've experienced digital satellite, you're not rushing out to get cable."</p> <p>-Charlie Ergen, <i>Denver Post Interview</i>, Oct. 5, 1997.<sup>19</sup></p>	<p>"Even analog cable operators historically have had tremendous advantages over DBS operators . . ."</p> <p>-<i>Opposition</i>, Feb. 25, 2002, p. 36.</p>
<b>C-Band As Competition To DBS</b>	<p>"Indeed, the size and cost of these dish antennas have rendered C-band technology largely obsolete."</p> <p>-<i>EchoStar Amended Complaint</i>, April 5, 2001, p. 10.<sup>20</sup></p>	<p>"[C-band] products remain very attractive, particularly in areas where dish size is not important."</p> <p>-<i>Application</i>, Dec. 3, 2001, p. 40.</p>
<b>The Cable Industry's Rollout of Digital Cable</b>	<p>"Where [the cable industry] has come out in general [with digital cable], as they have done, and advertised in a market, they really raised the awareness about digital television in the marketplace. We have seen strong customer growth, and an increase in the total market. It increases for us."</p> <p>-Roxanne Austin, <i>Hughes Investment Call</i>, Jan. 17, 2002.</p>	<p>"If EchoStar and DIRECTV are to continue to succeed, they must match . . . the dire competitive threat posed by the [digital] upgrade of these incumbents' systems."</p> <p>-<i>Opposition</i>, Feb. 25, 2002, p. 38.</p>
<b>The Cable Industry's Bounty Programs</b>	<p>"[D]igital cable is profoundly threatening to DBS. Among other things, digital cable: . . . has led the large cable multiple system operators to target DBS much more aggressively than in the past, including with . . . 'dish bounties,' and other satellite specific promotions."</p> <p>-<i>Opposition</i>, Feb. 25, 2002, p. 37.</p>	<p>"The [bounty program] is a very poor economic model for them . . . I think it's a very poor financial model for them. We will probably watch that, and if we see somebody doing something stupid, we'll take advantage of it . . ."</p> <p>-Charlie Ergen, <i>EchoStar Investment Call</i>, March 4, 2002.</p>
<b>The Product Market</b>	<p>"DBS is in a separate product market from alternative sources of programming, including cable television."</p> <p>-<i>EchoStar Memorandum</i>, Nov. 6, 2000, p. 12.</p>	<p>"EchoStar and DIRECTV compete in the market for Multichannel Video Program Distribution (MVPD)."</p> <p>-<i>Opposition</i>, Feb. 25, 2002, p. 33.</p>

<sup>19</sup> *Ergen On The Edge*, Denver Post, October 5, 1997, J-1 (*Denver Post Interview*).

<sup>20</sup> Amended Complaint, *EchoStar Communications Corporation, et al. v. DIRECTV Enterprises, Inc., et al.*, Civ. Action No. 00-K-212, p. 12 (D.Co. filed April 5, 2001) (*EchoStar Amended Complaint*).

<b>Issue</b>	<b>Flip</b>	<b>Flop</b>
<b>Competitive Broadband Offerings</b>	<p>"[F]rom the Hughes standpoint, we truly believe that broadband is here. And we have competitive offerings, if you just go to the satellite-based offering that we have, a competitive offering."</p> <p>-Jack Shaw, <i>Hughes Investment Call</i>, Jan. 17, 2002.</p>	<p>"[T]he merger of EchoStar and Hughes will create for the first time a truly competitive broadband alternative to DSL and cable modem service . . . consumers today located in areas served by DSL or cable modems lack access to effective satellite broadband competition."</p> <p>-<i>Opposition</i>, Feb. 25, 2002, p. 80 (emphasis in original).</p>
<b>Consumer Broadband Services</b>	<p>"[U]sing Ka-band satellite systems, will satisfy growing consumer demand for broadband services, and will be a significant step towards bridging the digital divide between urban and rural areas."</p> <p>-<i>EchoStar/VisionStar Application</i>, Dec. 15, 2000, p. 9.<sup>21</sup></p>	<p>"Nor could [EchoStar or DIRECTV] standing alone deploy on a timely basis an advanced residential broadband service of mass scale and appeal at an affordable price."</p> <p>-<i>Opposition</i>, Feb. 25, 2002, pp. 80-81.</p>
<b>The Critical Mass For Broadband Deployment</b>	<p>"The combination of EchoStar and VisionStar will help create the critical mass, scale efficiencies and realistic chances of commercial success that will help both companies to deploy Ka-band satellites as expeditiously as possible."</p> <p>-<i>EchoStar/VisionStar Application</i>, Dec. 15, 2000, p. 5.</p>	<p>"EchoStar currently does not have access to sufficient spectrum, orbital locations or capital resources to achieve (our) targets. All of these limitations, however, can be overcome by combining the resources of [Hughes and EchoStar] once the merger is approved."</p> <p>-<i>Opposition</i>, Feb. 25, 2002, p. 101 (discussing EchoStar's limited Ka-band development).</p>
<b>The Use of Theoretical Analysis</b>	<p>"[P]roper competition analysis is limited to alternatives that are 'practical in the business situation faced by the merging firms' and should not rely on alternatives that are 'merely theoretical.'"</p> <p>-<i>Opposition</i>, Feb. 25, 2002, p. 8.</p>	<p>"The Commission has reported that it is technically feasible for a new terrestrial service, which the Commission has dubbed Multichannel Video Distribution and Data Service (MVDDS) to share spectrum allocated to DBS in the 12.2 – 12.7 GHz band."</p> <p>-<i>Opposition</i>, Feb. 25, 2002, p. 53.</p>

<sup>21</sup> Application for Consent to Transfer of Control Over Authorization, File No. 200-SAT-P/LA-95 (filed December 15, 2000) (EchoStar/VisionStar Application).

<u>Issue</u>	<u>Flip</u>	<u>Flop</u>
<b>Regulation vs. Competition</b>	<p>“Regulation as a tool for facilitating broadband deployment . . . has historically led to market inefficiencies.”</p> <p>-<i>Opposition</i>, Feb. 25, 2002, p. 115.</p>	<p>“New EchoStar will commit to a [regulated] nationwide pricing policy for basic broadband services that will translate effective competition in urban areas into benefits to all households for broadband service, just as it will for MVPD services.”</p> <p>-<i>Opposition</i>, Feb. 25, 2002, p. 118.</p>
<b>A Monopoly's Willingness To Provide Innovative Services</b>	<p>“[T]he proposed merger offers the possibility of substantial efficiency improvements . . . which would directly benefit DBS consumers by providing an expanded array of services.”</p> <p>-<i>Willig Declaration</i>, Dec. 3, 2001, p. 12.</p>	<p>“As is well documented in the literature of economics, monopolists do not invest the full amounts required for economic efficiency when they are provided with monopoly returns on their investments.”</p> <p>-<i>Willig Letter</i>, Dec. 11, 2001.<sup>22</sup></p>

<sup>55</sup> A "-" symbol is inserted in those instances where the FCC has not established a milestone date.

S11.441

\*The Licensee may apply to the International Telecommunication Union (ITU) -- through the FCC -- for an extension of this date. In order to receive an extension, the Licensee must make a showing of various due diligence requirements. The ITU may extend the Bring Into Use date by two years under the conditions specified in ITU Radio Regulations Articles S11.44B through S11.44I.

COMPANY	ORBITAL SLOT	COMMENCE CONSTRUCTION	COMPLETE CONSTRUCTION	LAUNCH AND OPERATE (ECC)	ITU BRING INTO USE DATE
Hughes Communications, Inc.	131° W.L.	August 2002	--	March 9, 2003*	March 2005
Kasstar Corp. World Satellite, LLC	111° W.L.	August 2002	--	March 9, 2003*	March 2005
Lockheed Martin Corporation	139° W.L.	August 2002	--	March 9, 2003*	March 2005
Loral CyberStar, Inc.	147° W.L.	August 2002	--	March 9, 2003*	March 2005
Pan AmSat Corporation	133° W.L.	August 2002	--	March 9, 2003*	March 2005
Pacific Century Group, Inc.	72° W.L.	August 2003	--	March 9, 2003*	March 2005
Pegasus Development Corporation	107° W.L.	August 2002	--	March 9, 2003*	March 2005
FMW, Inc.	15° E.L.	August 2002	--	March 9, 2003*	March 2005

Ka-Band Licensees With Milestones  
That May Be Adjusted Through Commission and ITU Action

COMPANY	ORBITAL SLOT	COMMENCE CONSTRUCTION	COMPLETE CONSTRUCTION	LAUNCH AND OPERATE (ECC)	ITU BRING INTO USE DATE
Telesat 28	95° W.L.	--	August 2003	September 2003	November 2004
VisionStar	113° W.L.		April 2002	May 2002	May 2005
Local Space & Communications	89° W.L. 81° W.L. 47° W.L. 78° E.L.	May 1998 May 1998 May 1998 May 1998	April 2002 April 2002 April 2002 April 2002	May 2002 May 2002 May 2002 May 2002	November 2004 November 2004 November 2004 November 2004

Ka-Band Licensees With Milestones  
That May Be Adjusted Through Commission Action

EXHIBIT B

### **Certificate of Service**

I HEREBY CERTIFY that on this 17<sup>th</sup> day of June, 2002, a true and correct copy of the foregoing Petition to Deny of the National Rural Telecommunications Cooperative in the Matter of Application of VisionStar Incorporated (SAT-MOD-20020430-00075), was submitted via hand delivery to the Federal Communications Commission and served via courier, electronic mail or First Class Mail upon the following:

**Served via courier:**

The Honorable Michael K. Powell  
Chairman  
Federal Communications Commission  
445 Twelfth Street, S.W., Room 8-B201  
Washington, D.C. 20554

The Honorable Michael J. Copps  
Commissioner  
Federal Communications Commission  
445 Twelfth Street, S.W., Room 8-B115  
Washington, D.C. 20554

The Honorable Kathleen Q. Abernathy  
Commissioner  
Federal Communications Commission  
445 Twelfth Street, S.W., Room 8-A302  
Washington, D.C. 20554

The Honorable Kevin J. Martin  
Commissioner  
Federal Communications Commission  
445 Twelfth Street, S.W., Room 8-A302  
Washington, D.C. 20554

William F. Caton  
Acting Secretary  
445 Twelfth Street, S.W., Room TW-B204  
Washington, D.C. 20554

Peter A. Tenhula  
Senior Legal Advisor to Chairman Powell  
Federal Communications Commission  
445 Twelfth Street, S.W.  
Washington, D.C. 20554

Susan Eid  
Legal Advisor to Chairman Powell  
Federal Communications Commission  
445 Twelfth Street, S.W.  
Washington, D.C. 20554

Jordan Goldstein  
Senior Legal Advisor to Commissioner  
Copps  
Federal Communications Commission  
445 Twelfth Street, S.W.  
Washington, D.C. 20554

Suzanna Zwerling  
Media and Consumer Protection  
Legal Advisor to Commissioner Copps  
Federal Communications Commission  
445 Twelfth Street, S.W.  
Washington, D.C. 20554

Paul Margie  
Spectrum and International Legal Advisor  
to Commissioner Copps  
Federal Communications Commission  
445 Twelfth Street, S.W.  
Washington, D.C. 20554

Bryan Tramont  
Senior Legal Advisor to Commissioner  
Abernathy  
Federal Communications Commission  
445 Twelfth Street, S.W.  
Washington, D.C. 20554

Sam Feder  
Senior Legal Advisor to Commissioner  
Martin  
Federal Communications Commission  
445 Twelfth Street, S.W.  
Washington, D.C. 20554

Catherine Crutcher Bohigian  
Legal Advisor on Cable and Mass Media  
Issues  
Federal Communications Commission  
445 Twelfth Street, S.W.  
Washington, D.C. 20554

Donald Abelson  
Chief, International Bureau  
Federal Communications Commission  
445 Twelfth Street, S.W.  
Washington, D.C. 20554

Anna M. Gomez  
Deputy Bureau Chief, International Bureau  
Federal Communications Commission  
445 Twelfth Street, S.W.  
Washington, D.C. 20554

William H. Johnson  
Deputy Chief, Media Bureau  
Federal Communications Commission  
445 Twelfth Street, S.W.  
Washington, D.C. 20554

Tom Tycz  
Chief  
Satellite and Radiocommunications  
Division, International Bureau  
Federal Communications Commission  
445 Twelfth Street, S.W., 6th Floor  
Room 6A624  
Washington, D.C. 20554

Cassandra Thomas  
Deputy Chief  
Satellite and Radiocommunications  
Division, International Bureau  
Federal Communications Commission  
445 Twelfth Street, S.W., 6th Floor  
Room 6A624  
Washington, D.C. 20554

Rosalee Chiara  
Satellite and Radiocommunications  
Division, International Bureau  
Federal Communications Commission  
445 Twelfth Street, S.W., 6th Floor  
Room 6A624  
Washington, D.C. 20554

Fern Jarmulnek  
Satellite & Radiocommunication Division  
International Bureau  
Federal Communications Commission  
445 Twelfth Street, S.W., 6th Floor  
Room 6A767  
Washington, D.C. 20554

Jennifer Gilsenan  
Chief  
Satellite Policy Branch  
International Bureau  
Federal Communications Commission  
445 Twelfth Street, S.W., 6th Floor  
Room 6A767  
Washington, D.C. 20554

Jonathan Levy  
Office of Plans and Policy  
Federal Communications Commission  
445 Twelfth Street, S.W.  
Washington, D.C. 20554

Gary M. Epstein  
James H. Barker  
Arthur S. Landerholm  
Latham & Watkins  
555 11<sup>th</sup> Street, N.W.  
Suite 1100  
Washington, D.C. 20004  
*Counsel for General Motors Corporation  
and Hughes Electronics Corporation*

Pantelis Michalopoulos  
Carlos M. Nalda  
Philip L. Malet  
Rhonda M. Bolton  
Steptoe & Johnson LLP  
1330 Connecticut Avenue, N.W.  
Washington, D.C. 20036-1795  
*Counsel for EchoStar Communications  
Corporation; and  
Counsel for VisionStar Incorporated*

**Served via electronic mail:**

W. Kenneth Ferree  
Chief, Media Bureau  
Federal Communications Commission  
445 Twelfth Street, S.W.  
Washington, D.C. 20554

James Bird  
Office of General Counsel  
445 12 Street, S.W.  
Room 8-C824  
Washington, D.C. 20554

Barbara Esbin  
Cable Service Bureau  
445 12 Street, S.W.  
Room 3-C458  
Washington, D.C. 20554

Marcia Glauberman  
Media Bureau  
445 12<sup>th</sup> Street, S.W.  
Room 3-A738  
Washington, D.C. 20554

Julius Knapp  
Office of Engineering and Technology  
445 12<sup>th</sup> Street, S.W.  
Room 7-B133  
Washington, D.C. 20554

JoAnn Lucanik  
International Bureau  
445 12<sup>th</sup> Street, S.W.  
Room 6-C416  
Washington, D.C. 20554

David Sappington  
Office of Plans and Policy  
445 12<sup>th</sup> Street, S.W.  
Room 7-C452  
Washington, D.C. 20554

Royce Sherlock  
Media Bureau  
445 12<sup>th</sup> Street, S.W.  
Room 3-A729  
Washington, D.C. 20554

Douglas W. Webbink  
Chief Economist  
International Bureau  
Federal Communications Commission  
445 Twelfth Street, S.W., 6th Floor West  
Washington, D.C. 20554

Qualex International  
Portals II  
445 12<sup>th</sup> Street, S.W.  
Room CY-B402  
Washington, D.C. 20554

**Served Via First Class Mail:**

David K. Moskowitz  
Director VisionStar Incorporated  
5701 South Sante Fe  
Littleton, CO 80120

  
Tammy Hines



